

L411ENCC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 VICTOR ENCARNACION, et al.,

4 Plaintiffs,

5 v.

16 Civ. 156 (DLC)

6 CITY OF NEW YORK,

7 Defendant.

Remote Conference

8 April 1, 2021
9 11:10 a.m.

10 Before:

11 HON. DENISE COTE,

12 District Judge

13 APPEARANCES

14 THE BRONX DEFENDERS

Attorneys for Plaintiffs

15 BY: NIJI JAIN, ESQ.

JENNIFER R. BORCHETTA, ESQ.

16 ADAM N. SHOOP, ESQ.

17 NEW YORK CITY LAW DEPARTMENT

OFFICE OF THE CORPORATION COUNSEL

Attorneys for Defendant

18 BY: SAMANTHA M. SCHONFELD, Assistant Corporation Counsel

SHERRILL KURLAND, Assistant Corporation Counsel

19 ALSO PRESENT: MATTHEW R. RUSSO, Agency Attorney
20 Legal Bureau, NYPD

L411ENCC

(Case called)

THE COURT: For the plaintiffs?

MS. JAIN: Good morning, your Honor. Niji Jain from the Bronx Defenders for the plaintiffs.

THE COURT: Thank you.

And for defendants?

MS. SCHONFELD: Good morning, your Honor. Samantha Schonfeld, assistant corp counsel, for the defendants.

THE COURT: Thank you.

I'm going to ask everyone to mute their phone or their audio if they are not speaking so we don't have feedback. Thank you.

I have a motion from the plaintiffs for an extension of one year from the date of my decision on this motion of a settlement agreement between the city and the plaintiffs and an amendment to the settlement agreement that would impose upon the city the duty to demonstrate that it has achieved compliance with the goals of the underlying settlement agreement. The agreement had a two-year term, and that expired on February 8, 2020. It was extended on consent, however, and expired effectively on October 31, 2020.

So I reviewed the papers submitted by counsel. I think I'm ready to rule on the motion, but I wanted to give counsel an opportunity to add anything they wish to say in connection with this application.

L411ENCC

Ms. Jain, is there anything that you wanted to add?

MS. JAIN: Thank you, your Honor. Yes. I wanted to add that in our view, the request that we've made for the year extension plus the obligation to demonstrate compliance is not an amendment to the settlement but in fact core within what the settlement already requires, because paragraph 16 of the settlement agreement imposes upon the government a duty to take all steps necessary to ensure compliance, and specifically implement policies, procedures, training, supervision, monitoring, and discipline sufficient to ensure compliance with their obligations. As demonstrated in the motion, plaintiffs have brought forward evidence that defendants are not living up to that obligation, and the request is simply to force them to comply with what is already required under the settlement agreement; in other words, it's a remedy that's well within the bounds of what they're already obligated to do under the agreement.

THE COURT: Well, I certainly understand, Ms. Jain, your position that it's within the spirit of the agreement, but you're not suggesting it's within the four corners of the agreement as presently written.

MS. JAIN: Your Honor, the agreement says that the NYPD is obligated to deliver a voucher to an individual at the stated time absent extraordinary circumstances, and here, what we have seen is a pattern of people not receiving those

L411ENCC

1 vouchers regardless of, you know, what the circumstances are,
2 and that failure is explicitly what they were required to
3 remedy under the agreement itself, and so because the agreement
4 requires them to take the steps necessary to ensure compliance,
5 what we're asking for now is an order from the Court directing
6 them to take the steps necessary to ensure compliance. We
7 believe it's consistent within the terms of the agreement.

8 THE COURT: Okay. I'm looking at paragraph 16, and do
9 you see in paragraph 16, or any other portion of the agreement
10 that you'd like me to look at, that the city has an obligation
11 to demonstrate compliance has been achieved?

12 MS. JAIN: Your Honor, I think the line within
13 paragraph 16 that says that the NYPD shall implement
14 monitoring -- policies, procedures, etc., and monitoring
15 sufficient to ensure compliance, that monitoring is something
16 that is part and parcel of their obligation, to monitor in a
17 way that ensures compliance. Yes, that's what I would point
18 to.

19 THE COURT: Great. So I'll focus on the word
20 "monitoring," and of course I have in mind the submissions that
21 the parties have made with respect to this motion.

22 Anything else you wanted to say, Ms. Jain?

23 MS. JAIN: I would just add that if the NYPD is
24 actually monitoring their voucher delivery and they're actually
25 in compliance with the settlement agreement, as they represent

L411ENCC

1 that they are, then they have had every opportunity to
2 demonstrate that, both to the plaintiffs in the course of the
3 three years that we've been working on this, and directly to
4 the Court in its opposition to this remedy, and indeed, if the
5 NYPD can show its compliance, then it really has no reason to
6 oppose the remedy that we seek, which is simply to demonstrate
7 that.

8 THE COURT: Now I did not see in the settlement
9 agreement any duty imposed upon the defendant to make reports
10 to the plaintiffs or to the Court. Did I overlook something?

11 MS. JAIN: No, your Honor. The spirit of the
12 settlement was set up so that the parties would have
13 flexibility to work together through the working group that had
14 been set up, and it was contemplated that through that working
15 group, the parties would be able to exchange information around
16 compliance and then work collaboratively to troubleshoot
17 problems that came up -- for example, this exact problem -- and
18 we attempted to work together with defendant, but they were not
19 willing to implement additional reforms when it became clear
20 that there were still compliance issues.

21 THE COURT: Now I believe I remember reading in the
22 city's papers that they had offered to continue those working
23 group meetings. Are the plaintiffs willing to continue to
24 participate in the working group meetings outside the structure
25 of the settlement?

L411ENCC

1 MS. JAIN: Yes, your Honor. Absolutely. And in fact,
2 during the course of the last several months, the plaintiffs in
3 fact requested a meeting of the working group and defendant
4 declined to meet with us, citing the pending motion, but we are
5 very much interested in going forward with those working group
6 meetings, and what we are seeking is the additional structure
7 and supervision of a court order to ensure that the defendant
8 is actually taking the steps necessary and sharing information
9 as appropriate.

10 THE COURT: Thank you very much, Ms. Jain.

11 Ms. Schonfeld.

12 MS. SCHONFELD: Thank you, your Honor.

13 We agree with the Court's characterization of
14 plaintiffs' request as one for an amendment to the settlement
15 stipulation, and plaintiffs' request that defendants show
16 compliance and put forth evidence of compliance is not within
17 the four corners of the stipulation, as your Honor previously
18 stated.

19 The city defendants are in compliance. We've taken
20 steps; we've conducted departmentwide training; we continue to
21 conduct Quality Assurance Division (QAD) audits on a monthly
22 basis, and that is continuing going forward since the
23 expiration of the settlement; the department issued Finest
24 Messages; we've participated in numerous working group sessions
25 with the plaintiffs and have troubleshooted issues that have

L411ENCC

1 come up regarding individual unordinary circumstances, etc. So
2 we don't see any evidence of systemic noncompliance. We have
3 not gotten any complaints from any other boroughs to suggest
4 that there is systemic noncompliance with the stipulation and
5 with voucher delivery policies and procedures, so the city
6 maintains that we are in fact in compliance with the terms of
7 the stipulation as signed by the parties back in 2018.

8 And that's all, your Honor.

9 THE COURT: So plaintiffs -- would everyone please
10 mute their phones if you're not speaking.

11 Plaintiffs' counsel has focused on the word
12 "monitoring" in paragraph 16, Ms. Schonfeld. Could you
13 please -- and if you could speak slowly. There seems to be an
14 echo, and it's probably hard for the court reporter to capture
15 everything that's being said. If you could focus specifically
16 on what the city has or hasn't done to monitor, as required in
17 paragraph 16.

18 MS. SCHONFELD: Sure, your Honor.

19 So as I said before, the police department continues
20 to monitor voucher delivery and voucher compliance through the
21 ongoing Quality Assurance Division audits. Pursuant to the
22 stipulation, I believe that the police department was only
23 supposed to, or only required to conduct these audits on a
24 monthly basis. In practice, we are actually conducting them
25 generally on a monthly basis, and that's how the city is

L411ENCC

1 monitoring their compliance.

2 THE COURT: So Ms. Schonfeld, if you could mute your
3 audio.

4 Ms. Schonfeld, I think you meant to say that the
5 agreement only required auditing on a quarterly basis but
6 instead you're doing it on a monthly basis. Did I understand
7 correctly?

8 MS. SCHONFELD: Yes, Judge. Yes, Judge.

9 THE COURT: Thank you.

10 So let me finally ask the city, are you willing to
11 continue with the informal working group meetings with
12 plaintiffs' counsel to try to troubleshoot any problems on an
13 ongoing basis?

14 MS. SCHONFELD: Of course, your Honor, and as we said
15 in our papers, we offered that to plaintiffs originally, but
16 they declined. They wanted the Court's jurisdiction to
17 continue. But the city is open to continuing the working
18 groups on a quarterly basis to troubleshoot any issues.

19 And that's all.

20 THE COURT: Thank you.

21 So counsel, I want to begin by, again, commending
22 you -- both the plaintiffs and the city -- for working
23 cooperatively together on this important issue and arriving at
24 a settlement agreement a few years ago that I think was to the
25 benefit of one and all. All of the citizens of New York City

L411ENCC

1 have benefited by your resolution of this underlying
2 litigation, setting up new procedures to make sure arrested
3 people have vouchers provided to them or their counsel in a
4 timely way that permits them to retrieve personal property that
5 is not subject to seizure as part of the underlying criminal
6 case, whatever that might be. And of course as I remember it,
7 this case was focused on perceived deficiencies in the Bronx,
8 but we're one city, and the NYPD's revisions of its practices
9 and policies have been enacted throughout the city, so to the
10 extent improvements have been made, they've benefited all five
11 boroughs and all people arrested within the five boroughs, and
12 you have my congratulations on that positive approach to this
13 litigation and that improvement of outcomes for one and all.

14 Sadly, we've all been affected in the city by a
15 pandemic, a global pandemic, and so one of the procedures --
16 not required by the consent decree, or the settlement
17 agreement, but that grew out of your discussions, as I
18 understand it -- was going to be a computerized system, but the
19 pandemic has interfered with perhaps the funding of and
20 certainly with the implementation of that. It wasn't required,
21 but it would have been certainly to the benefit of one and all,
22 and I include the city and the police department in that. The
23 computerized procedures would have made it possible I think to
24 provide more effective notice with less burden, if that had
25 been able to be achieved; but sadly, it hasn't. I think the

L411ENCC

1 pandemic has probably interfered with everyone's ability to
2 wrap up this litigation in the way that was initially
3 contemplated, as it has interfered with so much in life. And
4 we've all had to be flexible and creative and use common sense
5 as we respond to a pandemic in every aspect of our lives, but
6 certainly professionally too, in our workplace and in what we
7 hope to achieve for litigants and litigators. And I speak
8 frankly as a member of our court. I know firsthand how many
9 new procedures had to be created, how much effort had to be put
10 into thinking through how to continue our work in a radically
11 changed environment.

12 So let me turn, with those preliminary remarks behind
13 me, to the specific issue. And again, there is a request here
14 that I extend the settlement agreement for one year from today
15 and that I impose a duty on the city to demonstrate that it has
16 achieved compliance with the goals of the settlement agreement.
17 I find that that request would require me to impose on the city
18 an obligation that is not presently contained within the four
19 corners of the settlement agreement. And I focus in particular
20 on paragraph 16, as the plaintiffs have asked me to do so, and
21 particularly on the word "monitoring." I don't think there's
22 any dispute that the auditing process is ongoing, as described
23 in the defendant's papers, but that is separate from a duty to
24 demonstrate to the plaintiffs or the Court that compliance has
25 been achieved.

L411ENCC

1 Let me turn to some principles of law that will govern
2 my ruling on this request.

3 Obviously the terms of the settlement agreement are
4 governed by the four corners of the agreement, and for me to
5 revise the agreement as requested here, the plaintiff would
6 have a duty to show that there was a breach of the underlying
7 agreement. And in assessing whether or not there has been a
8 breach, I have to apply what is the ordinary breach of contract
9 principles that we're all familiar with under New York law.
10 And I cite for that principle *Fisher*, 948 F.3d at 605. And as
11 a result, I cannot alter the terms of the agreement absent a
12 material breach or other special circumstances. And I cite for
13 that proposition the Second Circuit case in *Manning*, 299 F.3d
14 at 164.

15 The plaintiffs have explicitly rejected the notion
16 that they are seeking a finding from me that the city has been
17 in contempt of this Court. A contempt finding would require
18 proof of noncompliance with the agreement. That proof would
19 have to be by clear and convincing evidence or proof that the
20 city had not acted diligently in attempting to comply in a
21 reasonable manner with the requirements of the agreement. I
22 cite for that proposition *CBS*, 814 F.3d at 98.

23 The plaintiffs have relied on informal surveys -- one
24 conducted in early 2019; another conducted in the fall of 2019.
25 Of course the first survey was conducted before much of the

L411ENCC

1 training and implementation had been undertaken by the city,
2 which happened between February and September of 2019. So it
3 is the second survey, which ran roughly over a two-week period,
4 as I understand it, in the Bronx in the fall of 2019, that is
5 most apt. However, the plaintiffs haven't shown that their
6 survey evidence would be admissible. They have not shown that
7 it would be sufficiently reliable for me to make a finding that
8 there has been a breach. And the law with respect to
9 admissibility of survey evidence is set forth in, among other
10 places, the Second Circuit decision in *Schering*, 189 F.3d at
11 225.

12 So I'm going to deny the motion for the request of an
13 extension of the settlement agreement and for an amendment of
14 the settlement agreement to impose upon the city an additional
15 duty that it demonstrate compliance.

16 That said, I'm very heartened to hear that both the
17 plaintiffs and the city wish to continue working together in
18 the working group process. I'm hopeful that that will
19 eliminate any remaining problems, or help to reduce them, and
20 of course it's much in the city's interest that it complies
21 fully with the law and that there be no systemic violation of
22 the law. Individual problems may arise. That's to be expected
23 in life. No system is perfect; no institution is perfect. But
24 there should not be widespread noncompliance with the law going
25 forward, and if the city fails to comply, it runs the risk, of

L411ENCC

1 course, again of another lawsuit and another request for
2 another consent decree. So it is in everyone's interest here
3 that the law be complied with; certainly in the interests of
4 the citizens of the city of New York.

5 I want to thank counsel again for your cooperation
6 with each other and for working so creatively on behalf of all
7 citizens to address this important issue. Thank you.

8 I hope everyone stays well and as safe as possible in
9 the circumstances. Thank you very much.

10 ALL COUNSEL: Thank you, your Honor.

11 o0o
12
13
14
15
16
17
18
19
20
21
22
23
24
25